Filed 12/26/18 Fidelity Natl. Title Insurance Co. v. New Haven Financial, Inc. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FIDELITY NATIONAL TITLE INSURANCE COMPANY, Plaintiff, v. NEW HAVEN FINANCIAL, INC. et al., Defendants.	A146881 (Alameda County Super. Ct. No. RG12659236) **ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT**
MARK GREEN, Cross-Complainant and Appellant, v. ALBERT RAWLINS, et al., Cross-Defendants and Respondents.	

BY THE COURT:

It is ordered that the opinion filed herein on November 30, 2018, be modified as follows: On page 2, in the second sentence of the paragraph commencing with the words, "Pastor Robinson's death in 2005 set off a power struggle . . . , " the phrase "who had returned to Apostolic in 2002 after he formed Grace Pentecostal Church" is deleted and replaced with "who had returned to Apostolic after he formed Grace Pentecostal Church."

The petition for rehearing filed December 17, 2018, is denied. There is no change in judgment.

Date: _____P.J.

Filed 11/30/18 Fidelity Natl. Title Insurance Co. v. New Haven Financial, Inc. CA1/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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FIDELITY NATIONAL TITLE INSURANCE COMPANY, Plaintiff, v. NEW HAVEN FINANCIAL, INC. et al., Defendants,	A146881 (Alameda County Super. Ct. No. RG12659236)
MARK GREEN, Cross-Complainant and Appellant, v. ALBERT RAWLINS et al., Cross-Defendants and Respondents.	

In 2005, Charles Green, Sr. (Charles Green) and Albert Rawlins (Rawlins) began their long-running battle for the pastorship of Apostolic Bible Way Church, Inc. (Apostolic). The dispute involved multiple lawsuits as well as an appeal to Apostolic's governing church body. Eventually, Rawlins acquired control of the church and its properties.

In 2007, while the pastorship was in dispute, Charles Green obtained a $150,000 loan secured by a deed of trust against one of Apostolic's properties. Five years later, the loan defaulted and the lenders commenced foreclosure. After the deed of trust was

declared null and void, Fidelity National Title Insurance Company (Fidelity), the lenders' title insurer, paid $150,000 to its insureds to settle their claim.

In 2012, Fidelity sued Charles Green as well as several members of the Green family including his son, appellant Mark Green (Mark), to recover the payout, alleging that Charles Green fraudulently represented himself as Apostolic's pastor in order to obtain the loan. The Greens cross-complained against Rawlins, his wife, and his affiliates. The cross-complaint sought to set aside on equitable grounds two prior judgments which effectively placed the church properties in Rawlins's control. The trial court sustained successive demurrers, the last without leave to amend, finding the claims untimely and barred by res judicata or collateral estoppel.

On appeal, Mark, the sole appellant, contends his family's cross-complaint states valid claims and the demurrers should have been overruled. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because this appeal challenges a trial court order sustaining a demurrer, we draw the relevant facts from the complaint and facts subject to judicial notice. (See *Adams v. Paul* (1995) 11 Cal.4th 583, 586.)

Overview

For over six decades, Pastor Henry L. Robinson (Pastor Robinson) presided over Apostolic, a part of the Pentecostal Assemblies of the World, Inc. (PAW). During his tenure, Pastor Robinson donated to the church two properties on Athens Avenue and Quigley Street in Oakland.

Pastor Robinson's death in 2005 set off a power struggle over who would succeed him and control the church and its properties. Charles Green, the church's secretary and chief financial officer at the time of Pastor Robinson's death, and Rawlins, who had returned to Apostolic in 2002 after he formed Grace Pentecostal Church, both claimed to be pastor following two separate elections. In February 2005, nine church members, most of them Charles Green's family, met and elected Charles Green pastor. In May 2005, after Diocesan Bishop Henry Johnson of PAW's 16th Episcopal District ruled that

the process electing Charles Green was "out of order," various members of Rawlins's family elected Rawlins pastor.

Over the next several years, Charles Green and Rawlins contested who was Apostolic's rightful pastor in multiple superior court proceedings in which both men litigated purportedly on behalf of Apostolic, as well as in proceedings before PAW, Apostolic's governing church body.

Past Litigation[1]

The first of several lawsuits between the parties to this appeal was *Apostolic Bible Way Church v. Charles L. Green, et al.* (Alameda Superior Court Case No. WG05213712), an unlawful detainer action initiated by Rawlins in May 2005 ("First Unlawful Detainer"). In this case, Rawlins sought to evict Charles Green and his family from the church properties located at 821-825 Athens Avenue.

While this First Unlawful Detainer was pending, both Charles Green and Rawlins, each representing himself to be the church's leader, conducted business on behalf of Apostolic, and continued to do so throughout their pastorship dispute. On June 14, 2005, Rawlins filed a Statement of Information with the California Secretary of State identifying himself as Apostolic's Chief Executive Officer. Two weeks later, Charles Green, identifying himself as the "personal guarantor for the Apostolic Bible Way Church," took out a $50,550 loan secured by church property. On July 8, 2005, a deed of trust (Number 2005283792) was recorded on the property for the loan.

In August 2005, with the First Unlawful Detainer still pending, Charles Green initiated, *Apostolic Bible Way Church, Inc. et al. v. Albert Rawlins, et al.* (Alameda County Superior Court Case No. RG05227868) (the "*Green* Action" or "*Green*"). This

[1] Appellant Mark Green requested we take judicial notice of certain records from past related litigation. We grant the request under Evidence Code section 452, subdivision (d)(1), which allows us to take judicial notice of the records of any court in this state. Further, under the same provision, we take judicial notice of the additional records, orders, and judgments from the various superior court cases referenced here. In addition, under Evidence Code section 452, subdivision (h) and section 459, we take judicial notice of the recorded deeds, deeds of trust, and notices referenced.

lawsuit sought a judicial determination that Green was Apostolic's duly elected pastor. He also sought to enjoin the First Unlawful Detainer to prevent Rawlins from obtaining a judgment for possession of Apostolic's property. Rawlins filed a cross-complaint which requested in part "a judicial determination . . . that this matter is an internal church dispute, under the exclusive jurisdiction and remedy of the hierarchical church, The Pentecostal Assemblies of the World, Inc., and its process and decision is not subject to judicial review."

The following month, the trial court decided the First Unlawful Detainer against Charles Green and his family. The court awarded possession of 821-825 Athens Avenue to Apostolic and ordered the Greens to leave the property. Judgment was entered on September 2, 2005.

In October 2005, Rawlins filed a second unlawful detainer action against the Greens, *Apostolic Bible Way Church v. Charles L. Green, et al.* (Alameda Superior Court Case No. WG05237961 and WG05237966) ("Second Unlawful Detainer"), to remove them from the church's other Quigley Street property.

In March 2006, with two suits pending between Rawlins and Green in superior court (*Green* and the Second Unlawful Detainer), PAW's judiciary committee ruled on an appeal Charles Green filed challenging the Diocesan Bishop's May 2005 decision deeming his election as Apostolic's pastor out of order. PAW's judiciary committee ruled: " 'At no time since the demise of [Pastor Robinson], has there been an election held according to the bylaws of the Apostolic Bible Way Church. In this instance, the Church has not been afforded its right of self-determination regarding its Pastor.' " The PAW committee recommended the matter be adjudicated by a bishop who would meet with the original members of Apostolic and conduct an election. The PAW committee further stated "the appointment of . . . Rawlins [is to] be considered null and void until a Pastor is duly elected by the membership of said church in accordance with their bylaws. We further recommend that all parties cease and desist from any and all ongoing legal action, and that they be a[t] peace among themselves in the spirit of godliness." PAW's

Executive Board adopted the judiciary committee's report. However, no new election occurred, and litigation continued.

In September 2006, in the Second Unlawful Detainer, the trial court again decided against Charles Green and his family. With this judgment, Rawlins secured possession of both of Apostolic's properties.

In November 2006, in the *Green* Action, following the conclusion of a bench trial, the matter was submitted.

In December 2006, while the parties awaited the court's decision in *Green*, Rawlins filed his third case, *Apostolic Bible Way Church, Inc., by and through Pastor Albert Rawlins v. Bayview Financial Management* (Alameda County Superior Court Case No. RG06302392) (the "*Bayview* Quiet Title Action" or "*Bayview*"). In this lawsuit, Rawlins sought to void the deed of trust executed by Charles Green for the $50,550 loan. Rawlins named Charles Green, Mark Green, and other Green family members as defendants, among numerous others. They were served in late 2006 but no Green responded to the complaint.

In March 2007, Charles Green obtained a $150,000 loan, again secured by church property. To do so he executed a Grant Deed (Number 2007160245) in which he represented he was the "personal Guarantor for the Apostolic Bible Way Church." A Deed of Trust (Number 2007157200) was recorded against church property on April 20, 2007, to secure the loan. Fidelity allegedly issued a lender's title insurance policy which insured the Deed of Trust as a valid encumbrance.

Meanwhile, in May 2007, Rawlins obtained default judgment in the *Bayview* Quiet Title Action against all of the named Green defendants. The default judgments, entered on May 31, 2007, established that the deed of trust for the $50,550 loan was "null and void, cancelled, and set aside." The default judgment also established that the Greens had had no interest in the church's Quigley Street property, and that the Grant Deed and Deed of Trust dated April 20, 2007 were both "null and void and set aside."

Although none of the Greens responded to the summons in *Bayview*, their own case (the *Green* Action) continued to move forward. On June 29, 2007, the trial court in

Green issued a 74-page Statement of Decision. The court ruled that Rawlins was Apostolic's pastor before September 2, 2005, but not pastor after that date and that no one could be pastor until a valid election was held. The election of the pastor had to be resolved in accordance with Apostolic's articles of incorporation and bylaws and in conformance with PAW's governing documents. Further, the issues of church governance were ecclesiastical matters over which the superior court had no jurisdiction.

The court in the *Green* Action also found Apostolic failed to keep adequate books and records of accounts, minutes of its proceedings, and lists and records of its members, and that the true status of members in good standing was to be determined under the by-laws and by PAW. In accord with these findings, the court declined to declare that the Greens constituted Apostolic's membership, that Charles Green, Arisha Green or Mark Green were ever directors of Apostolic, or that Charles Green was the church's pastor.

The court further denied Rawlins's request for declaratory relief on his cross-complaint. The court " 'specifically decline[d] to determine or declare that for any period subsequent to September 2, 2005, [Rawlins] ha[d] been lawfully appointed or elected pastor of Apostolic . . . and decline[d] to declare that any other person properly holds any office of Apostolic . . . .' " An Amended Judgment in *Green* was entered on August 1, 2007.

On July 6, 2007, approximately one week after the *Green* Action Statement of Decision, Rawlins obtained an Amended Judgment in *Bayview*. The Amended Judgment added the following paragraph: "The court makes a judicial determination that Defendants CHARLES GREEN, SR., STEVEN GREEN, MONICA GREEN, CORLIS GREEN, MARK GREEN, ARISHA GREEN, and each of them were not, nor are not agents, officers, directors or in any position of authority of APOSTOLIC BIBLE WAY CHURCH, INC. The authorized agent as of May 11, 2005 is Pastor ALBERT RAWLINS. APOSTOLIC BIBLE WAY CHURCH, INC. did not authorize, ratify, consent, or have knowledge of the actions taken by [the Green family Defendants] taken on behalf of APOSTOLIC BIBLE WAY CHURCH, INC. The Amended Judgment also deleted reference to the "null and void" deed and deed of trust recorded in April 2007.

No election for a new pastor was held following entry of judgment in *Green*, and litigation between the Greens and Rawlinses came to a temporary standstill. Rawlins continued to make business filings on behalf of the church. In April 2008, Rawlins and his wife filed a Statement of Information with the California Secretary of State naming themselves President and Secretary of Apostolic Bible Way Church. The Statement of Information also stated that Apostolic's name was changed in its articles of incorporation, and it was now "Center of Grace Ministries."

In 2010, the pause in litigation ended when Ress Financial Corporation, a foreclosure company, recorded and issued a "Notice of Default and Election to Sell Under Deed of Trust" and thereby alerted Rawlins that the $150,000 loan obtained by Charles Green was in default and church property was in foreclosure.

On May 7, 2010, following a hearing, Rawlins obtained another Amended Judgment in the *Bayview* Quiet Title Action. The May 7, 2010 Amended Judgment restored the following paragraphs: "6. The purported deed dated April 21, 2007 executed by CHARLES GREEN, SR. and recorded with the Alameda County Recorder's Office, Recordation Number 2007160245 is null and void and set aside. [¶] 7. That the purported deed of trust dated and recorded April 20, 2007 with the Alameda County Recorder's Office Recordation Number 2007157200 is null and void and set aside."

On June 3, 2010, with the twice amended judgment in the Bayview Quiet Title Action in hand, Rawlins filed *Center of Grace Ministries formerly known as Apostolic Bible Way Church, Inc., by and through Pastor Albert Rawlins v. Ress Financial Corp.* (Alameda County Superior Court Case No. RG10518327) (the "*Ress* Quiet Title Action" or "*Ress*") to clear title to the church property. Rawlins named as defendants the lenders and financiers of the loan who claimed an interest in the church property in the foreclosure. Neither Charles Green, Mark Green, or any Green family member was named in the complaint.

Fidelity defended its insureds sued by Rawlins. On October 13, 2011, to settle its insureds' claims, Fidelity paid them $150,000. On June 22, 2012, judgment was entered in the *Ress* Quiet Title Action. In the judgment, the trial court declared that Apostolic,

which had changed its name to Center of Grace Ministries, was the fee owner of the church's Quigley Street property. The April 2007 deed of trust and deed in which Charles Green claimed to be an authorized agent of Apostolic were "null and void and invalid and stricken and set aside and the documents form no basis whatsoever for any claim of title, lien or default by Defendants." The court further ordered that "any and all agreements and contracts between all Defendants and each of them, and executed in the name of Plaintiff or any of the defendants or other persons, and any all other addendums, agreements and contracts between all Defendants and others and each of them relating to the property are hereby rescinded and null and void[.]"

This Litigation

On December 10, 2012, Fidelity sued Charles Green, Mark Green, members of their family and others for fraudulent misrepresentation and unjust enrichment seeking to recover the $150,000 it had paid to settle its insureds' claims. Fidelity alleged that in March 2007, Charles Green, purporting to act on behalf of Apostolic as its Chief Executive Officer, applied for a loan secured by church property when in fact he was not the Chief Executive Officer of the church and was not authorized to act on its behalf. Fidelity further alleged that Charles Green received significant funds from the loan and did not deliver the funds to the church but rather shared the loan proceeds with his family.

On March 26, 2014, the Green family cross-complained against Rawlins, his attorney, Center of Grace Ministries and Apostolic (collectively the Rawlinses or the Rawlins Cross-Defendants). On May 18, 2015, following a voluntary amendment and two successive demurrers, the Greens filed their Third Amended Cross-Complaint (TACC), the operative pleading in this appeal. The TACC asserted three causes of action for: (1) breach of charitable trust against Rawlins and Center of Grace Ministries; (2) equitable relief to set aside two prior judgments in actions filed by Rawlins on behalf of Apostolic; and (3) an accounting against Rawlins and Center of Grace Ministries.

The Rawlins Cross-Defendants' demurrer to the TACC was sustained without leave to amend. The court stated, "After several opportunities to amend, cross-

complainants failed to allege facts sufficient to constitute a cognizable cause or causes of action against Cross-Defendants. Most importantly, Cross-Complainants failed to allege facts showing that the claims alleged are timely and not barred by the doctrines of res judicata/collateral estoppel. [¶] . . . [¶] The cross-complaint . . . is hereby dismissed."

Mark Green now appeals and is the only member of the Green family to do so.

DISCUSSION

I. Standard of Review

The parties dispute the applicable standard of review. Mark Green contends it is de novo. The Rawlinses argue that "[t]his is not a de novo review of the facts, because in a Demurrer the facts are undisputed." They contend we review for an abuse of discretion.

The most fundamental rule of appellate review is that an appealed judgment or order is presumed to be correct. "All intendments and presumptions are indulged to support [the order] on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the burden to overcome that presumption of correctness and show reversible error. (*State Farm & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

We review an order sustaining a demurrer de novo to determine whether the complaint states facts sufficient to constitute a cause of action. (*Bower v. AT & T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1552; *Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 Cal.App.4th 333, 341 (*Stanton Road*).) We construe the complaint "liberally with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) " ' "[W]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' " (*Stanton Road, supra*, 36 Cal.App.4th at p. 340; see *Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 296-297.) We will affirm a "trial court's decision to sustain the demurrer [if it] was correct on any theory. [Citation.]" (*Kennedy v. Baxter Healthcare*

Corp. (1996) 43 Cal.App.4th 799, 808.) Thus, "we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself. [Citations.]" (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.) Even on de novo review, the scope of our review is limited to those issues that have been adequately raised and supported in appellant's brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn.6.)

We review the denial of leave to amend after the sustaining of a demurrer under an abuse of discretion standard. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 719.) "[I]f not, there has been no abuse of discretion and we affirm. [Citations.]" (*Stanton Road, supra,* at p. 341.) We may affirm the trial court's judgment on any basis supported by the record, whether or not relied upon by the trial court. (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412.)

Here, we will review the order sustaining the Rawlinses' demurrer to the TACC de novo. We will consider as true all facts that are properly pleaded, but not contentions, deductions or conclusions of fact or law. Since Mark offers no argument with respect to the part of the trial court's order denying him leave to amend, there is no need to review any aspect of the trial court's order for an abuse of discretion.

II. The Claim for Equitable Relief to Set Aside Prior Judgments

Because the equitable claim to set aside two prior judgments is the central cause of action in the TACC, we begin our analysis there.

Mark Green contends the trial court erred when it dismissed his cause of action to set aside the judgments from the *Bayview* and the *Ress* Quiet Title Actions. He argues Rawlins initiated *Bayview* in the name of Apostolic "under the fiction that he was Apostolic's pastor," and he filed *Ress* as "Center of Grace Ministries formerly known as

Apostolic Bible Way Church," a non-entity. Mark argues that "[i]n each of the lawsuits, the named plaintiff was a fiction created by Rawlins [who] lacked standing to sue." This is because Rawlins sued in each on Apostolic's behalf as its pastor without actual authority to do so. For these reasons, he claims "the courts lacked jurisdiction over them" and the judgments are void for lack of jurisdiction under Code of Civil Procedure section 473, subdivision (d).[2] Mark is mistaken.

"The term 'jurisdiction,' 'used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition.' [Citation.] Essentially, jurisdictional errors are of two types. 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' [Citation.]" (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660 (*American Contractors*).)

"However, 'in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations.' [Citation.] It may also 'be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' [Citation.] '[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.' [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by 'principles of estoppel,

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[2] Code of Civil Procedure section 473, subdivision (d) provides, "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

disfavor of collateral attack or res judicata.' [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless 'unusual circumstances were present which prevented an earlier and more appropriate attack.' [Citations.]" (*American Contractors, supra,* 33 Cal.4th at p. 661.)

Both the *Bayview* and *Ress* judgments which the Greens seek to attack were not void for a lack of jurisdiction. In both cases, the court had fundamental jurisdiction, which included subject matter jurisdiction, which Mark does not dispute, and personal jurisdiction over Rawlins, who initiated the actions. (1 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 161, p. 764 ["[T]he plaintiff, by bringing the action, submits himself to the jurisdiction of the court with respect to his cause of action."].). Because the court had fundamental jurisdiction in both *Bayview* and *Ress*, the alleged defects in the cases he seeks to reopen rendered the judgments voidable, not void. Since there was no direct attack on the judgments in either case, for example by an appeal or a motion to vacate the judgment, the long-settled rule immunizing the final judgments from collateral attack applied. (See *Pacific Mutual Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725.)

Mark contends the courts lacked jurisdiction over Rawlins based on his lack of standing to sue or and his lack of authority arising from erroneously suing in the name of the church. Not so. "[L]ack of standing as a real party in interest is not jurisdictional; it is equivalent only to a failure to state a cause of action." (*County of Riverside v. Loma Linda University* (1981) 118 Cal.App.3d 300, 319.) Also, "under well settled law the lack of authority to sue (i.e., the person is not the real party in interest) is equivalent only to a failure to state a cause of action and the defect is not jurisdictional." (*In re Eugene W.* (1972) 29 Cal.App.3d 623, 631.) Thus, the errors Mark alleges in *Bayview* and *Ress* were not the types that rendered the judgments in those cases void, only voidable. They are " 'nonjurisdictional errors for which collateral attack will not lie. [Citation.]' " (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 491.)

The two cases Mark relies upon also do not provide grounds for reversal.

In *J.C. Peacock, Inc. v. Hasko* (1960) 184 Cal.App.2d 142 (*Peacock*), the court explained, "It is fundamental that an action brought in the name of a non-existent plaintiff, natural or artificial, is a nullity. [¶] 'In every action there must be a real plaintiff who is a person in law and is possessed of a legal entity or existence as a natural, artificial, or quasi-artificial person . . . . [¶] . . . [A]n action may not be maintained in the name of a plaintiff who is not a natural or an artificial person having legal entity to sue or be sued.' " (*Id.* at p. 151-152.) On this basis, the court determined that the plaintiff, the surviving post-merger corporation, could not initiate a lawsuit in the name of the merged-out corporation. (*Ibid.*) Citing to Corporations Code section 4116, which provided that " '[u]pon merger . . . , the separate existence of the constituent corporation ceases,' " the court observed that a new action "cannot be initiated in the name of the dead (constituent) corporation." (*Id.* at p. 151, italics omitted.) Having filed multiple complaints in the name of a corporation that no longer existed, the court concluded the plaintiff "could not initiate the action at law." (*Id.* at p. 152.)

In *Oliver v. Swiss Club Tell* (1963) 222 Cal.App.2d 528, the court similarly observed, "Where a suit is brought against an entity which is legally nonexistent, the proceeding is void *ab initio* and its invalidity can be called to the attention of the court at any stage of the proceedings." (*Id.* at p. 538.) At issue was whether the defendant unincorporated association was "an existent person" that could be sued, or whether the association was dissolved when it was incorporated decades earlier. (*Id.* at p. 538.) The court concluded "it was necessary for defendant to show that the incorporation asserted by it was sanctioned by both the laws of this state and the organizational regulations, if any." (*Id.* at p. 545.) On summary judgment, the court determined there was not enough evidence establishing the dissolution of the unincorporated association which would have rendered it non-existent and not subject to a lawsuit. (*Id.* at p. 545 [summary judgment cannot stand, "there must be facts showing that the incorporation in question resulted in the dissolution of defendant unincorporated association"].)

Neither case helps Mark. While the cases set forth the rule that non-existent parties cannot sue or be sued, neither case provides authority to conclude the named

plaintiffs in *Bayview* or *Ress* were non-existent. Unlike *Peacock*, this is not a case which presents the question of whether a newly dissolved corporation continues its existence. Nor is this a case like *Oliver*, which involves the status of an unincorporated association said to have been incorporated years earlier. In those cases, the courts could look to applicable corporations law coupled with evidence of a merger to decide whether the litigant existed. Here, we are not dealing with such a situation, and Mark never explains how the *Bayview* or *Ress* plaintiffs are non-existent entities under these cases.

Additionally, the *Peacock* case relied upon by Mark noted, " 'In every action there must be a real plaintiff who is a person in law and is possessed of a legal entity or existence as a natural, artificial, or quasi-artificial person.' " (*Peacock*, *supra*, 184 Cal.App.2d at p. 152.) There is no dispute that Rawlins is a real person, nor is there any dispute about Apostolic's existence. The TACC alleges Rawlins is the pastor and CEO of Center for Grace Ministries. As a real person, Rawlins had the capacity to file a lawsuit against Charles Green and other defendants.

Because Mark has not convinced us that the plaintiffs in *Bayview* or *Ress* were non-entities incapable of filing suit, neither the *Bayview* or *Ress* judgments were void. At most, they were merely voidable and not subject to collateral attack. The demurrer to the Greens' second cause of action was proper.

III. Breach of Charitable Trust (Corporations Code section 9142)

Mark argues that the court erred when it dismissed the Greens' first cause of action for violation of corporation code section 9142. Again, we disagree.

The doctrine of res judicata operates to give " ' "certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." [Citation.]' " (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*).) The primary aspect of res judicata, claim preclusion, bars a second suit between the same parties on the same cause of action. (*Ibid.*) The secondary aspect of res judicata, collateral estoppel, operates as conclusive adjudication as to issues in a second lawsuit which are identical to issues actually litigated and necessarily decided in a prior lawsuit. (*Ibid.*; *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507-1508.)

"The doctrine of collateral estoppel precludes relitigation of an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit." (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.)

" 'In California[,] the phrase "cause of action" is often used indiscriminately . . . to mean *counts* which state [according to different legal theories] the same cause of action. . . .' [Citation.] But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." (*Boeken, supra,* 48 Cal.4th at p. 798.) "Causes of action are considered the same if based on the same primary right." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 325.) " '[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered.' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) "Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken, supra,* at p. 798.)

In the first *Green* Action, the Greens sought a judicial declaration that Charles Green's election was Apostolic's only proper election of a pastor for the church. Noting Rawlins's attempts to evict the Greens from Apostolic's properties, the Greens also sought an injunction enjoining Rawlins from obtaining a judgment for possession of them. The trial court in *Green* issued an expansive Statement of Decision. It concluded that the issue of who was pastor was determined by the First Unlawful Detainer at least through September 2, 2005, when judgment was entered in that action. However, the court declined to make any judicial determination as to who was Apostolic's pastor after September 2, 2005. The court determined the election of pastor subsequent to September 2, 2015, had to be resolved in accordance with Apostolic's articles of incorporation and

bylaws and in conformance with PAW's governing documents. The court further denied the Greens' request for an injunction that would have prohibited Rawlins from taking possession of the church properties.

In the current action, the Greens continue to seek Rawlins's removal from Apostolic. In their TACC, the Greens allege they have demanded Rawlins "return church property to Apostolic Bible Way Church" which demand has been rejected. The TACC also alleges that Rawlins and Center of Grace Ministries have not managed the property Pastor Robinson donated for Apostolic's benefit or according to Apostolic's direction and that Rawlins and Grace "have acted in a manner contrary to the best interests of the corporation and lacking such care . . . as an ordinary prudent person in a like position would use under similar circumstances. These actions have perverted, and continue to pervert, the founding purposes of Apostolic Bible Way Church, Inc. and the charitable intent of former pastor Henry L. Robinson." Due to an alleged breach of the charitable trust, the Greens ask for a judgment requiring the "immediate removal" of the Rawlinses and prohibiting them from occupying any leadership position at Apostolic for several years. They also seek a declaration "naming the rightful owners" of the church properties on Quigley Street and Athens Avenue.

We have no difficulty concluding the *Green* Action and this one involve the same primary right. In both cases, the Greens seek to undo Rawlins as head of Apostolic and his family's possession of the church's properties. Mark even acknowledges the "cross-complaint is really an action for return of title in property to the real Apostolic Church." Mark tries to dress this breach of charitable trust claim as a new and different theory of liability, but it is premised on the same injury the Greens sued upon in 2005, namely, Rawlins's takeover of Apostolic and its properties. The *Green* Action, filed in 2005, contested Rawlins's claim to pastor and his possession and control of Apostolic's assets, and the trial court resolved those claims to a final judgment. In their TACC, filed in 2014, the Greens invoke the same harm they have suffered due to Rawlins's acts. Because the TACC involves the same issues and the same parties as the *Green* Action

resolved in a final judgment, res judicata bars relitigation of the Greens' claims against the Rawlinses for breach of charitable trust alleged in this lawsuit.

Mark argues res judicata does not bar the first cause of action because he and his family members were not defendants in Rawlins's *Ress* lawsuit, so there was no identity of parties. He further contends that Charles Green was an indispensable party to *Ress*, so he cannot be bound to the judgment there. Neither of these arguments compel a different outcome. "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. . . . The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. [Citations.] The doctrine also serves to protect persons from being twice vexed for the same cause." (*Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942)19 Cal.2d 807, 810.) We recognize none of the Greens were sued in *Ress*, but *Ress* is not the basis for our application of res judicata. In the *Green* Action, the Greens received a fair trial on the issues that it is seeking to once again litigate here, and they should not again be allowed to draw those issues into controversy.

IV. Accounting

Mark contends the trial court erred when it dismissed the third cause of action for an accounting. Not so. An accounting is not an independent cause of action but a type of remedy that depends on the validity of the underlying claims. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, disapproved on another ground in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626; see *Janis v California State Lottery Comm.* (1998) 68 Cal App 4th 824, 833-834 ["A right to an accounting is derivative; it must be based on other claims."].) Since Mark's other claims fail, so too does the one for an accounting.

V. Constitutional Arguments

Mark further asserts that the trial court's decision sustaining the demurrer violated the First Amendment.[3] Mark contends that by foreclosing his cross-complaint, the superior court effectively ratified Rawlins's "takeover" of Apostolic and deprived Apostolic's members of their First Amendment right to select their pastor. " 'As a general rule, issues not raised in the trial court will not be considered on appeal.' " (*Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 101, fn. 5 (*Blankenship*); *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1101 ["Typically, constitutional issues not raised in earlier civil proceedings are waived on appeal."].) " 'Even a constitutional right must be raised at the trial level to preserve the issue on appeal [citation].' [Citation.] In civil cases, constitutional questions not raised in the trial court are considered waived. [Citation.]" (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) Because the First Amendment issue was not raised in the trial court, we decline to consider it on appeal.

We also cannot help but observe that Mark's assertion of the First Amendment limitation here would counsel that the court stay out of this dispute rather than adjudicate rights under the TACC that the court in the *Green* Action concluded were ecclesiastical. This makes no sense.

VI. Neutral Principles

Lastly, Mark contends that under the "neutral principles" doctrine, the cross-complaint must be reinstated. Mark says that under this doctrine, "court intervention in church disputes is allowed if a decision can be rendered using 'neutral principles of law.' " This argument was also not raised by the Greens in the trial court, and we will not consider it for the first time on appeal. (See *Blankenship, supra,* 186 Cal.App.4th at p. 101.)

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[3] Green also contends in the subject heading of this argument that the trial court's decision violated the Fourteenth Amendment but offers no explanation of how so. We disregard this claim as unsupported by any argument.

DISPOSITION

The order sustaining the demurrer to the Greens' TACC without leave to amend is affirmed.

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Siggins, P.J.

We concur:

_____
Pollak, J.*

_____
Jenkins, J.

Fidelity National Title Insurance Co. v. New Haven Financial, Inc., A146881

* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, sitting by assignment pursuant to article VI, section 6 of the California Constitution.